

Permissible Silence Or Impermissible Deceit

BY BRAD RUDIN AND BETSY HUTCHINGS

In a recent murder case in Nassau County, the prosecution withheld from the defense the fact that it had an eyewitness to the murder, after it had apparently encouraged the defense to believe there was no eyewitness. The case raises an important question: Is it permissible for a prosecutor to remain silent when he knows that counsel for the accused is relying on misinformation that has been provided to him by the State. In the Nassau case, defense counsel alleged that the prosecution encouraged the impression that the People did not have an eyewitness to the murder.

The issue came to the attention of the press. One article reported that defense counsel had alleged that the prosecutor "failed to tell him for months about the existence of a key witness in the case..." A. Givens, *DA Is Accused Of Deceit*, newsday.com, April 18, 2007. In an article following the jury's acquittal of the accused, defense counsel was paraphrased as saying that the prosecutor had implied that there was no witness to the crime. Z. Dowdy, *Jury Acquits Hempstead Man Of Murder Charge*, newsday.com, may 19, 2007.

Assuming that the prosecutor did conceal the existence of a witness, what wrong - if any - did the prosecutor commit? And what measures would be helpful in regulating a prosecutor's conduct when concealment of a witness' existence would appear to the prosecutor to be a useful tactical option?

These questions are not answered by DR 7-102(A), which prohibits counsel from eight specific acts of dishonesty in representing a client. None of these mandates the correction by a prosecutor of a false impression by the defense. DR 7-102(A)(5) prohibits counsel from knowingly making a false statement of law or fact, but that does not on its face require him to correct a false impression by defense counsel, nor is the propriety of his silence effectively addressed by the rule prohibiting lawyers from failing "to disclose that which the lawyer is required by law to reveal." DR 7-102(A)(3).

DR 7-102(A)(3) does apply to cases like *Brady v. Maryland*, 373 U.S. 83 (1964), in which the Supreme Court held that the suppression of exculpatory evidence was a denial of constitutional due process. But the rule would not appear to extend to cases like the Nassau case. No law in that case required the prosecutor to disclose the existence of the eye-witness, and the facts do not suggest that the witness' testimony would have exonerated the defendant.

If we conclude that tactically motivated silence remains outside the scope of DR 7-102(A), perhaps we can turn to DR 1-102(A)(4) to find support for the argument that silence constitutes misrepresentation. That rule bars counsel from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation."

But the (A)(4) rule - like the others in DR 1-102 defining a lawyer's misconduct is "highly abstract," and does not focus on silence as "fraud, deceit or misrepresentation." See, R. Simon, *Simon's New York Code of*

Professional Responsibility Annotated, West, 2006. As a result, it provides limited guidance on whether a prosecutor's silence necessarily constitutes deceit.

As Professor Wolfram observed more than two decades ago, the law governing lawyers allows the conclusion that "active misrepresentation is prohibited, while passive misrepresentation is problematical." C. Wolfram, *Modern Legal Ethics*, West, 1986 at 723. More recently, Professor Bruce green noted the "fuzzy" line "between permissible silence and impermissible deceit." B. green, *Deceitful Silence*, 33 no. 2 *Litigation (ABA)* 24, 26 Winter 2007.

Plainly, the Nassau prosecutor did not violate the discovery provisions of the New York Criminal Procedure Law (CPL), which impose no categorical obligation on a District Attorney to reveal the names of the People's witnesses or to disclose all of the proof that the prosecution intends to present to the trier of fact. *See*, CPL 240.20, 240.45 (identifying *particular* kinds of evidence that must be disclosed to the defense).

Because the undisclosed witness in the Nassau County case was not an exculpatory witness, concealment of his existence did not violate *Brady* principles requiring the disclosure of exculpatory evidence. When non-*Brady* information exists, concealment through tactical silence is both predictable and essentially unregulated.

The ABA's Standards For Criminal Justice (1993) bar a prosecutor from knowingly making "false statements or representations" to defense counsel during plea discussions [Standard 3-4.1(c) (Prosecution Function)], but this does not adequately confirm a duty to rebut false impressions that may have been imparted to the defense. A comment (*Misrepresentation by Prosecutor to Defense Counsel*) following Standard 3-4.1 urges prosecutors to "avoid the use of deception in dealing with the evidence," but this warning, also, does not focus on the "fuzzy" line "between permissible silence and impermissible deceit," *supra*.

Review of New York case law is similarly unhelpful to a prosecutor who seeks guidance on how to conform his or her conduct to the rules prohibiting deceit. In a case in which a defendant entered a plea of guilty without knowing that the complaining witness had died, the Court of Appeals found no due process violation and offered only a cursory review of the professional responsibility issues relevant to the case. *People v. Jones*, 44 ny2d 76, 404 nyS2d 85 (1978).

Construing the issue of "deceitful persuasion" with respect to the prosecutor's pre-plea silence about the complainant's death, the Jones Court observed "that silence should give rise to legal consequences only if it may be concluded that the one who was silent was under an affirmative duty to speak." *Id.* at 88. After reviewing professional responsibility and constitutional standards requiring the prosecution to disclose exculpatory evidence, the Court found that the disclosure of "tactical data" was not regulated by these standards, *Id.* at 89, and held "there was no obligation on the part of the prosecutor to reveal to defense counsel that [complaining witness] Roiguez had died...." *Id.*

The Jones Court did not discuss whether the prosecutor had a duty to withdraw his statement of readiness for trial upon the death of the witness [see, CPL 30.30 (the speedy trial statute)]. If the People were in fact unable to proceed to trial without the witness, the statement of readiness was no longer truthful. *See, People v. England*, 84 ny2d 1, 613 nyS2d 854 (1994) ("...readiness is not defined simply by an

empty declaration that the People are prepared to present their direct case."); *People v. Cole*, 73 ny2d 957 (1989) (CPL 30.30 dismissal ordered when the People did not rebut the defense claim that the statement of readiness was illusory).

Failure of the *Jones* Court to discuss the statement-of-readiness issue leaves prosecutors with little guidance whether silence is an ethically permissible response when counsel for the accused formulates a strategy based on outdated or flawed information presented by the prosecution. True, silence may be justified by the basic principle that a lawyer is not "under any obligation to come forward unbidden with information that is unknown to the other side." See, *Modern Legal Ethics* at 639, but this precept should not be used to justify silence by the very lawyer who knows that he will benefit because opposing counsel has misread the situation.

To help resolve the issue of silence versus disclosure, we can turn for guidance to circumstances other than those presented in a criminal matter. In NYCLA Eth. Op. 731, 2003 WL 25294953, the County Lawyers' ethics committee considered a case in which claimant's counsel in a commercial arbitration learned from a source other than the defendant's counsel that the defendant was near insolvency. The claimant - unaware that defendant might have an insurance policy that would be more than enough to satisfy the claim - offered to settle the dispute for 15% of its true value. Did defendant's counsel have a duty to disclose the existence of insurance or could he take advantage of claimant's ignorance?

The committee resolved this ethical dilemma by distinguishing between information obtained by a lawyer from a third party (no duty by counsel to correct) and information obtained from opposing counsel himself (creating an affirmative duty to correct). "... [W]e believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source." *Id.* But where a lawyer believes that opposing counsel "is relying on a materially misleading representation attributable to the lawyer," the lawyer should take steps to end opposing counsel's reliance on the misinformation. *Id.*

Applied to the facts in *Jones*, this approach (subject to an exception which we note below) would require a pre-plea disclosure by the prosecutor of the complainant's death. In the usual criminal matter, the death of the complainant means that the prosecutor's CPL 30.30 ready-for-trial declaration is no longer valid. Under those circumstances, the prosecution is deliberately withholding a material fact from the defense and has an affirmative duty to correct a crucial misunderstanding by defense counsel. NYCLA Eth. Op. 731, *supra*.

However, because the death of the complainant does not always rebut the prosecution's ready-for-trial statement, this approach generally requires a case-by-case analysis. The complainant in a robbery case may die, but the prosecution may remain ready for trial if it can prove its case by evidence other than the complainant's statement. For example, a defendant's admissible confession and a video recording of the crime may, notwithstanding the death, provide a sufficient basis for the prosecution to proceed to trial.

The failure to disclose the complainant's death in *Jones* resulted in the concealment of the *absence* of evidence. In the Nassau County murder case, the prosecutor allegedly attempted to conceal the *existence* of evidence. In the Nassau case, counsel for the accused alleged that a prosecutor created the misimpression there was no witness to the crime. Newspaper accounts recited counsel's charge that a

detective had given misleading testimony about the absence of witnesses at the crime scene. The prosecution argued that the detective's testimony had been taken out of context.

If defense counsel's impression about the existence or non-existence of witnesses is simply the result of his own inadequate investigation of the facts and the prosecution has done nothing to mislead defense counsel about the availability of witnesses, then the prosecutor does not violate professional responsibility standards by remaining silent about the issue.

As the NYCLA ethics committee observed, "an attorney is not ethically obligated to prevent an adversary from relying upon information which emanated from another source." NYCLA Eth. Op. 731, *supra*. In that situation, it's clear that the 1-102(A)(4) anti-deceit rule would not require the prosecutor to disabuse defense counsel of a mistaken view of the People's evidence.

But deceit would emerge as an issue if the prosecution encouraged defense counsel's mistaken impression about the non-existence of evidence. See, NYCLA Eth. Op. 731, *supra* ("...an attorney has a duty not to mislead intentionally, either directly or indirectly..."). Thus, if police testimony reasonably creates a misimpression about the non-existence of a crime scene witness, the prosecutor - under the reasoning of this County Lawyers' ethics opinion - "should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression...." *See, Id.*

Because ethics opinions are merely persuasive - and, in any event largely inaccessible in the busy work-a-day world of state prosecutors - more authoritative - and more visible - authority is needed to provide guidance in those difficult situations in which the prosecutor's silence may constitute professional misconduct. Guidance could be presented in the text of proposed New York rule 8.4[c]. This proposed rule prohibits "deceit" and similar misconduct in language that mirrors DR 1-102(A)(4). An addition to the text of proposed 8.4 would help lawyers draw the line between permissible silence and impermissible deceit.

The addition could be based on NYCLA eth. Op 731, *supra*, in the same way as the disclosure of insurance coverage. We offer the following as our version of the change:

A lawyer shall not:

Engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Silence by a lawyer, including the prosecuting attorney in a criminal matter, or failure to disclose a material fact constituting evidence, shall constitute prima facie evidence of deceit and misconduct by the lawyer, if the lawyer knows, or has sufficient reason to know, that opposing counsel in the matter, is relying reasonably on information provided by the lawyer which is mistaken or no longer true and accurate. A lawyer shall not be required to rebut or refute any information derived by opposing counsel from a third party; nor to correct any misinformation or misunderstanding resulting from the failure of opposing counsel to investigate the facts of the matter.

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